

HONORABLE THOMAS O. RICE

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IN UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

GEORGE E. THOMAS, a single man,

Plaintiff,

vs.

CITY OF COLVILLE, a Municipal  
Corporation, COLVILLE CITY  
POLICE DEPARTMENT; REX  
NEWPORT, and JANE DOE,

Defendants.

CV-13-120-TOR

DEFENDANT REX NEWPORT'S  
MOTION AND MEMORANDUM  
TO EXCLUDE THE TESTIMONY  
OF D.P. VAN BLARICOM

HEARING: To Be Determined

**WITH ORAL ARGUMENT**

COMES NOW Defendant Rex Newport, by and through the undersigned attorney, and hereby moves the Court for an Order Excluding the Testimony of D.P. Van Blaricom. This motion is based on the files and records herein.

**I. JOINDER**

DEFENDANT REX NEWPORT'S MOTION  
AND MEMORANDUM TO EXCLUDE THE  
TESTIMONY OF VAN BLARICOM – pg. 1

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Officer Newport hereby joins in Defendant City of Colville's Motion to Exclude the Opinions of D.P. Van Blaricom, filed herewith. To the extent that the City of Colville's Motion does not address Mr. Van Blaricom's testimony related to claims against Officer Newport, Officer Newport provides the following in support of his request to exclude Mr. Van Blaricom's testimony.

## II. LAW/ARGUMENT

Evidentiary rulings are reviewed for an abuse of discretion. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir.2000). A motion to admit or exclude scientific evidence is reviewed under the same standard. *General Electric Co. v Joiner*, 522 U.S. 136 (1997). A district court has broad discretion in determining what method is appropriate for evaluation of reliability under the circumstances of each case. *Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256 (2nd Cir.2002). A review of the proposed testimony in this case establishes that the Court, in the exercise of its discretion, should exclude the testimony of Mr. Van Blaricom.

### A. Expert Testimony Must Meet The Applicable Daubert Standard In Order To Be Admissible At The Time Of Trial.

Fed. R. Evid. 702 states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

1 expert by knowledge, skill, experience, training or  
2 education, may testify thereto in the form of an opinion  
3 or otherwise.

4 In discussing the requirements of Rule 702, the Supreme Court has  
5 emphasized that federal judges maintain a "gatekeeping responsibility" to ensure  
6 that admitted scientific testimony is both relevant and reliable. *Mukhtar v.*  
7 *California State Univ. Hayward*, 319 F.3d 1073 (9th Cir. 2003) (citing *Daubert*  
8 *v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (*Daubert I*)). "The trial  
9 court must act as a 'gatekeeper' to exclude 'junk science' that does not meet Rule  
10 702's reliability standards by making a preliminary determination that the  
11 expert's testimony is reliable." *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526  
12 U.S. 137, 147-48 (1999)).

13 Even where an expert's testimony is found reliable, the court must still  
14 consider the relevance of the expert's proposed testimony. "Throughout, a judge  
15 assessing a proffer of expert scientific testimony under Rule 702 should also be  
16 mindful of other applicable rules." *Daubert I*, 509 U.S. at 595. Relevant evidence  
17 may be excluded:

18 if its probative value is substantially outweighed by the  
19 danger of unfair prejudice, confusion of the issues, or  
20 [would mislead] the jury ... expert evidence can be both  
21 powerful and misleading because of the difficulty in  
22 evaluating it. Because of this risk, the judge in weighing  
23 possible prejudice against probative force under Rule 403

1 of the present rules exercise more control over experts  
2 than other lay witnesses.

3 *Id.* (internal citations omitted); Fed.R.Evid. 403.

4 Here, Mr. Van Blaricom's testimony is contrary to applicable law and not  
5 relevant. Further his testimony is speculative, conclusory, and lacks adequate  
6 foundation. Finally, Mr. Van Blaricom is simply not qualified to render  
7 professional opinions regarding use of force as he is nearly 30 years removed  
8 from law enforcement and it has been almost four decades since he last  
9 handcuffed an individual.  
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13 **B. Mr. Van Blaricom Improperly Relies Solely On The Existence Of An  
14 Injury To Establish Excessive Force.**  
15

16 Mr. Van Blaricom opines that "it is my considered professional opinion  
17 that defendant officer subjected plaintiff to unreasonable and injurious force."  
18 *Van Blaricom's Rule 26(a)(2)(B) Report, dated October 21, 2013, amended April*  
19 *8, 2014, pg. 6, ¶ 11* (hereinafter "*Van Blaricom Report*"). Mr. Van Blaricom  
20 testified during his deposition that he relies solely on Mr. Thomas' torn rotator  
21 cuff to conclude Officer Newport used excessive force. *Dep. of Van Blaricom,*  
22 *pg. 27, lns. 1-12.*  
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26 Such reliance is contrary to the law in the Ninth Circuit as lawful arrests  
27 can result in injuries to the suspect consistent with the Fourth Amendment.  
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1 *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir.1994); *Mendoza v. Block*, 27  
 2 F.3d 1357 (9th Cir.1994). Furthermore, Mr. Van Blaricom is utilizing an  
 3  
 4 improper standard to determine whether excessive force was used. Mr. Van  
 5  
 6 Blaricom must weigh whether the force was objectively reasonable in light of the  
 7 facts and circumstances confronting Officer Newport, without regard to his  
 8  
 9 underlying intent or motivation. *Gregory v. Cnty of Maui*, 523 F.3d 1103, 1106  
 10 (9th Cir.2008); *Officer Newport's Motion for Summary Judgment, Section C (2)*,  
 11 *filed herewith*. Mr. Van Blaricom admitted he failed to do so in his deposition.  
 12  
 13 *See supra*. As such, this Court should exclude Mr. Van Blaricom's testimony  
 14  
 15 regarding whether Officer Newport utilized excessive force during the arrest.

16 **C. Mr. Van Blaricom Cannot Provide Legal Conclusions.**

17  
 18 Mr. Van Blaricom opines that "Defendant officer had no reasonable  
 19 suspicion that plaintiff had committed any crime . . ." and that "plaintiff never  
 20 committed any crime, for which he was subject to arrest by defendant officer."  
 21  
 22 *Van Blaricom's Report*, pg. 6, ¶ 10.

23  
 24 It is black-letter law that "[i]t is not for witnesses to instruct the jury as to  
 25 applicable principles of law, but for the judge." *United States v. Newman*, 49  
 26 F.3d 1, 7 (1st Cir.1995), *quoting Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505,  
 27  
 28 512 (2d Cir.1977). Further, a Court must not allow an expert to "merely tell the  
 29

1 jury what result to reach.” *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537,  
 2 1541 (11th Cir.1990) (citing Fed.R.Evid. 704 advisory committee notes). As  
 3 noted by the advisory committee notes to Rule 704, merely telling a jury what  
 4 decision to reach is not helpful to the trier of fact and is therefore inadmissible.  
 5 Fed.R.Evid. 704 advisory committee notes. “A witness also may not testify to the  
 6 legal implications of conduct; the court must be the jury's only source of law.”  
 7 *Montgomery*, 898 F.2d at 1541 (citations omitted). “Courts must remain vigilant  
 8 against the admission of legal conclusions, and an expert witness may not  
 9 substitute for the court in charging the jury regarding the applicable law.” *U.S. v.*  
 10 *Milton*, 555 F.2d 1198, 1203 (5th Cir.1977); *Burkhart v. Washington Metro.*  
 11 *Area Transit Auth.*, 112 F.3d 1207, 1212-14 (D.C.Cir.1997) (reversible error to  
 12 allow an expert in police practices to opine on whether police officers' efforts in  
 13 communicating with a deaf plaintiff were enough to satisfy federal disability  
 14 statutes); *Specht v. Jensen*, 853 F.2d 805 (10<sup>th</sup> Cir. 1988).

22 This Court should not allow Mr. Van Blaricom to testify to legal  
 23 conclusions under the guise that such conclusions merely reflect his "training and  
 24 experience." *See Report*, pg. 3, ¶7. Such testimony is clearly prohibited and  
 25 invades the province of the jury. Furthermore, such testimony should be  
 26 excluded pursuant to Fed.R.Evid. 403. Officer Newport respectfully requests that  
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 29

1 the Court enter an order precluding Mr. Van Blaricom from testifying to legal  
2 conclusions.  
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4 **D. Mr. Van Blaricom May Not Attempt To Opine Regarding Officer**  
5 **Newport's State Of Mind.**

6 Mr. Van Blaricom opines: "[i]t is my considered professional opinion that  
7 defendant officer's response to plaintiff was more probably than not an example  
8 of what is known in the police vernacular as "*contempt of cop*" or having "*failed*  
9 *the attitude test*." *Van Blaricom Report*, pg. 9, ¶ 13. Essentially, Mr. Van  
10 Blaricom is attempting to testify regarding Officer Newport's thought processes,  
11 his motivation, his intentions and subjective beliefs. For example, Mr. Van  
12 Blaricom opines that "[a] citizen displays conduct that is **perceived to be an**  
13 **"attitude" or a "disrespectful" challenge** to an officer's authority," "the officer  
14 responds to that **perceived challenge**," "'wins' the **personality conflict**" and "the  
15 subject of the officer's **displeasure** is charged with some pretextual offense . . ."  
16 *Id.* (emphasis added).  
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23 Such testimony is not only inherently speculative, it is simply  
24 inadmissible. *See, e.g., In re Baycol Products Litigation*, 532 F.Supp.2d 1029  
25 (D.Minn.2007) (Expert's opinion that manufacturer of cholesterol drug acted  
26 unethically, and his testimony regarding ethical issues, motive, intent, knowledge  
27 or state of mind of manufacturer and its employees, and about what other  
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1 physicians knew or would have done with different information, were  
 2 inadmissible); *In re: Rezulin Prod. Liab. Litig.*, 309 F.Supp.2d 531, 544  
 3 (S.D.N.Y.2004); (expert opinions as to the intent, motives or states of mind of  
 4 corporations, regulatory agencies and others have no basis in any relevant body  
 5 of knowledge or expertise.); *Lohrenz v. Donnelly*, 223 F.Supp.2d 25  
 6 (D.D.C.2002) ("courts have generally disfavored expert testimony in determining  
 7 actual malice, which is essentially a determination of defendants' subjective state  
 8 of mind"); *Harris v. Quadracci*, 856 F.Supp. 513, 518-19 (E.D. Wis.1994)  
 9 ("“expert opinion testimony generally is not helpful when determining actual  
 10 malice against a subjective standard”). Accordingly, this Court should preclude  
 11 such testimony.  
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13 **D. Mr. Van Blaricom's Opinions Are Conclusory, Speculative, And Lack**  
 14 **Adequate Foundation.**  
 15

16 As set forth above, the Court must undertake a rigorous inquiry into  
 17 whether the information that an expert will testify to is "specialized." *Daubert*  
 18 does permit an expert's testimony that is based upon specialized knowledge not  
 19 just scientific theory. *U.S. v. Bighead*, 128 F.3d 1329, 1130-31 (9th Cir. 1997.)  
 20 However, "[n]othing in *Daubert* or the Federal Rules of Evidence requires a  
 21 district court to admit opinion evidence that is connected to existing data only by  
 22 the *ipse dixit* of the expert. A court may conclude that there is simply too great  
 23



1 an analytical gap between the data and the opinion proffered." *General Electric*  
2 *Co.*, 522 U.S. at 146. Thus, regardless of whether the individual is an "expert"  
3 because of experience, there must still be some connection between the opinion  
4 and the data. While an expert may base an opinion on facts or data reasonably  
5 relied upon by experts in a field, and which need not necessarily be admissible  
6 evidence (Fed. R.Evid. 703), theoretical speculations, unsupported assumptions  
7 and conclusory allegations advanced by an expert are [not] entitled to any weight  
8 when raised in opposition to a motion for summary judgment. *E.T. Barwick*  
9 *Indus. v. Walter Heller & Co.*, 692 F.Supp 1331, 1347 (N.D.GA), *affirmed*, 891  
10 F.2d 906 (11<sup>th</sup> Cir. 1989) (citations omitted). There must be a factual foundation  
11 or basis for an expert's opinions.  
12

13 In the instant case, Mr. Van Blaricom admitted he did not review any  
14 applicable federal authorities or RCW 47.68.230 which requires pilots to present  
15 their license upon demand of any police officer. *Dep. of Van Blaricom*, pg. 31,  
16 *lns. 11 – 23; pg. 83, lns. 3 – 18; pg. 86, lns. 8 – 17*. Furthermore, Mr. Van  
17 Blaricom admitted in his deposition that if statute such as RCW 47.68.230  
18 existed, Officer Newport demanded Mr. Thomas' pilot's license, and Mr. Thomas  
19 refused, probable cause to arrest Mr. Thomas would have existed. *Dep. of Van*  
20 *Blaricom*, pg. 43, *ln. 18 – pg. 44, ln. 17*. However, the foregoing is precisely the  
21

1 context of Mr. Thomas' arrest. *See Defendant Newport's Motion for Summary*  
 2 *Judgment, filed herewith.* Clearly Mr. Van Blaricom lacks adequate foundation  
 3  
 4 to provide opinions in this matter and his testimony should be excluded.

5  
 6 **E. Mr. Van Blaricom Is Not Qualified To Provide Expert Opinions**  
 7 **Regarding Use Of Force.**

8 A party calling an expert must demonstrate that the witness qualifies as an  
 9 expert based on “knowledge, skill, experience, training, or education. . .”  
 10 Fed.R.Evid. 702. Mr. Thomas is simply unable to demonstrate that Mr. Van  
 11 Blaricom has the requisite knowledge, skill, experience, training or education to  
 12 render expert opinions in this case. Mr. Van Blaricom was a law enforcement  
 13 officer/administrator for 29 years with the Bellevue Police Department. *Van*  
 14 *Blaricom Report, pg. 1.* However, Mr. Van Blaricom retired from law  
 15 enforcement in 1985, and the last time he physically handcuffed an individual  
 16 occurred in 1975. *Dep. of Van Blaricom, pg. 14, ln. 10 – pg. 15, ln. 4.* He simply  
 17 has no practical or timely experience in the proper use of force in handcuffing  
 18 situations and in their proper application. While Mr. Van Blaricom may have  
 19 considerable police experience in general, he simply does not have the requisite  
 20 qualifications to make him an expert on the specific issues involved in this case.  
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27 In the end, what becomes very clear from reviewing Mr. Van Blaricom's  
 28 report and testimony is that his opinions in this case are nothing more than his  
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own personal opinions not based upon scientific, technical, or other specialized knowledge, and for which he lacks the requisite knowledge, skill, experience, training, or education. Such personal opinions are simply impermissible and do not meet the standards announced in *Daubert*.

#### IV. CONCLUSION

For the reasons set forth herein, Officer Newport respectfully requests that the Court grant this Motion and exclude Mr. Van Blaricom.

DATED this 11th day of July, 2014.

EVANS, CRAVEN & LACKIE, P.S.

By /s/ Michael E. McFarland Jr. /s/  
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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